PSYCHIATRIC/PSYCHOLOGICAL ISSUES IN THE CRIMINAL COURTS

Presentation 15 November 2022 to Legal Wise Criminal CLE

Judge P.E. Smith[1]

Introduction

[1] I have been asked to present a paper on psychiatric/psychological issues in the criminal courts. I consider this to be an important topic to cover as the courts regularly are asked to receive such evidence, particularly at the sentencing phase but also on occasions during a trial.

[2] The paper is not intended to cover issues concerning the Mental Health Court. That is a topic in itself for another day.

(a) The paper will cover the following topics:

(b) The admissibility of such evidence in trials.

(c) The admissibility of such reports in sentence.

(d) The impact of mental health in sentencing and what such reports should address.

Background

[3] In the Senate Committee Report to the Australian Parliament[2] it was noted that there is an over representation of people with mental illness in the criminal justice system. It was noted that New South Wales that some 74% of the inmate population had a "psychiatric disorder." This was consistent with Victorian surveys.

[4] Of interest it was noted that female prisoners have a higher prevalence of mental disorder than males (90% according to a particular study).

[5] There are several reasons for this namely general disadvantage, poverty, homelessness, unemployment, de-institutionalisation, substance abuse, a lack of early intervention and a lack of mental health services in the community.

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1 Judge Administrator, District Court of Queensland.

2 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/mentalhealth/report/c13

[6] It may be seen then that an expert report as to a person's mental health may be of great assistance to the court.

[7] It is appreciated that it may be difficult to obtain funding from Legal Aid for such reports. But in my view such reports are essential. If a lawyer is in a situation where such a report is needed but not funded they should give consideration to making application to the court for a pre-sentence report under section 344 of the Corrective Services Act.

Admissibility of psychiatric/psychological evidence in trials.

[8] The general rule is that opinion evidence is not admissible in criminal trials.

[9] However opinion evidence given by expert witnesses may be admissible.

[10] For expert evidence to be admissible it must be opinion evidence outside the usual experience of the jury and must be within the expert witness's area of expertise.

[11] Expert evidence will not be admitted where the jury can determine the matter for themselves.[3] The law recognises though that there can be matters which call for special knowledge or skill where the jury is not properly equipped to draw proper inferences from proved facts.

[12] As was said in *Osland v R*[4]

> "Expert evidence is admissible with respect to a relevant matter about which ordinary persons are '[not] able to form a sound judgment … without the assistance of [those] possessing special knowledge or experience in the area' and which is the subject 'of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience'."

[13] Of course the qualification of the expert witness is a matter for the trial judge to determine.

[14] Let me look at some examples from the decided cases.

[15] Although the expert was not a psychiatrist or psychologist the case of *Velevski v R*[5] is instructive. The High Court considered a situation where three children were

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3 *Clark v Ryan* [1960] HCA 42; (1960) 103 CLR 486 at p 491.
4 [1998] HCA 75; (1998) 197 CLR 316, 336.
5 [2004] HCA 4; (2002) 187 ALR 233; (2002) 76 ALJR 402.

murdered by having their throats cut. The mother also died. The father was charged and convicted. A number of pathologists gave evidence. Each was asked whether the wounds were consistent with the mother dying of her own hand or at the hands of another person. Two gave evidence it was probable she had committed suicide. Each of the other doctors held a contrary view.

[16] It was noted at [32] that the explanations of one of the doctors was not dependent only on his expertise i.e. whether the mother could have inflicted the wounds on the children. The question required a consideration of human behaviour and not scientific analysis. However it was accepted at [156] by Callinan and Kirby JJ that whether wounds may have been self-inflicted is capable of being expert evidence, provided a suitable foundation for the witnesses training study or experience has been established.

[17] In *R v LM*,[6] the Queensland Court of Appeal allowed an appeal against conviction and ordered a retrial where the appellant had been convicted of torture and wounding of her children. It was alleged she suffered the condition Munchausen's Syndrome by Proxy and she deliberately committed the crimes upon the children to gain sympathy and attention for herself.

[18] At trial a psychiatrist was called by the Crown to give evidence about the Syndrome. She had never met or examined the accused. The defence had unsuccessfully objected to the admission of this evidence.

[19] At [65] the Court of Appeal noted that whilst an ordinary person might be puzzled that a loving mother might perform such acts on her children, ordinary people are often puzzled by depraved behaviour seen in the criminal courts. If expert evidence like this was admitted in the present case why could such evidence not be lead in other cases e.g. that fathers can rape their daughters or that teachers sometimes sexually abuse their students.

[20] The Court of Appeal held that the evidence lead from the Psychiatrist was not of the propensity of the accused to act in a certain way, but of a propensity of other people to engage in such unlawful behaviour. The fact that other people have done this is not ordinarily the subject of expert evidence. The evidence was inadmissible and even if

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6 [2004] QCA 192.

it was technically admissible it should have been excluded in the exercise of the judge's discretion.

[21] Likewise in *R v Laing,*[7] the appellant had been convicted of the murder of his ex-partner. It was common ground the death could only have been caused by homicide or suicide. The prosecution adduced evidence from the deceased's psychiatrist that according to a peer- reviewed article there was a low suicide rate in females in Australia between 1998 and 2008. And only 3.76 % used a sharp implement to commit suicide. The court allowed the appeal. It held that the evidence had no real significance. The evidence was inexact and incomplete. There was no logical way to use the evidence.

[22] However the courts have been more liberal when it comes to defence expert evidence in criminal trials.

[23] Let me look at some examples.

[24] In *Osland v R,*[8] the accused and her son were charged with the murder of her husband. Each relied on provocation and self-defence. She alleged over the years the deceased had been violent towards her. An expert witness was called by the defence to give evidence of "battered wife syndrome." The evidence of the expert was that there is a reliable body of evidence that women who experience abusive relationships act in a way to what an ordinary persons might expect. For example there is evidence of heightened arousal or awareness of danger. At [57] Gaudron and Gummow JJ noted this was a proper matter for expert evidence. At [169] Kirby J noted that such expert evidence might be offered as to:

- Why the accused might remain in such a relationship.
- The nature and extent of the violence before a response is produced.
- The accused's ability to perceive danger from the spouse.
- Whether the accused believed on reasonable grounds there was no other way to react.

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7 [2019] QCA 289.
8 [1998] HCA 75; (1998) 197 CLR 316.

[25] I would have thought in Queensland that such evidence would be particularly relevant if the defence was raising a defence under s 304B of the *Criminal Code*.

> "**304B Killing for preservation in an abusive domestic relationship**
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> (1) A person who unlawfully kills another (the ***deceased***) under circumstances that, but for the provisions of this section, would constitute murder, is guilty of manslaughter only, if—
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> (a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and
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> (b) the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and
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> (c) the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.
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> (2) An ***abusive domestic relationship*** is a domestic relationship existing between 2 persons in which there is a history of acts of serious domestic violence committed by either person against the other.
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> (3) A history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation.
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> (4) Subsection (1) may apply even if the act or omission causing the death (the ***response***) was done or made in response to a particular act of domestic violence committed by the deceased that would not, if the history of acts of serious domestic violence were disregarded, warrant the response.
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> (5) Subsection (1)(a) may apply even if the person has sometimes committed acts of domestic violence in the relationship.
>
> (6) For subsection (1)(c), without limiting the circumstances to which regard may be had for the purposes of the subsection, those circumstances include acts of the deceased that were not acts of domestic violence
>
> (7) In this section—

> ***domestic violence*** see the *Domestic and Family Violence Protection Act 2012*, section 8."

[26] Also in the proposed Bill arising from the Women's and Safety Justice Taskforce, it is likely that expert evidence will be admissible in criminal proceedings as to the nature and effects of domestic violence on a person if it is relevant to a fact in issue in the case.

[27] Expert evidence can also be admissible on the question of the capacity of an accused to express themselves in a record of interview. For example in *Murphy v R*[9] the accused had been convicted of the murder of Anita Cobby in 1986. The accused at trial proposed to call a psychologist who was to give evidence of the fact the accused was of limited intellectual capacity and the confessional material was either inadmissible or unreliable. The trial judge refused to admit the evidence. Mason CJ and Toohey J held that the admissibility of the evidence could not be considered in a vacuum. The evidence of the psychologist would have assisted the jury in deciding the reliability of the confessional evidence.

[28] In *Farrell v R,*[10] the appellant was convicted of eight counts of rape and other sexual assaults. Expert psychiatric evidence was called by the defence that the complainant (who suffered from chronic alcoholism, drug abuse and lied to doctors to get drugs) suffered three mental disorders and in an extreme case these conditions might cause memory impairment. He could not though say if the complainant had this impairment. Also he gave evidence that people with these conditions frequently lied to obtain drugs and tended to exploit and con others, were deceitful and their information should be regarded with caution. The crown did not adduce any evidence to counteract the defence expert evidence. The judge directed the jury that the psychiatrist had not given any evidence the complaint had a condition which affected his capacity to recall and recount evidence and that the evidence did not "count" for anything. The majority found the directions erroneous and allowed the appeal.

- The majority found that expert evidence like this is admissible:

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9 [1988] HCA 50; (1988) 167 CLR 94.
10 [1998] HCA 50; (1998) 194 CLR 286.

- It discloses the existence of a disability which bears on the reliability of the witness's evidence and extends beyond the experience of ordinary persons (Gaudron J)

- Expert evidence is admissible on psychological and physical conditions which may lead to certain behaviour relevant to the credibility of the witness if it is beyond the ordinary experience of the trier of fact (Kirby J)

- An expert witness in a defence case is not confined to giving evidence of the relevant effects of a disorder or disability if the disorder or disability exists (Callinan J).

[29] Finally by way of case example I refer to the case of *R v Wade.*[11] The appellant was charged with murder. His matter was listed for trial. To the surprise of his counsel the appellant pleaded guilty when arraigned. On appeal the evidence of a psychologist was tendered. The expert evidence was the appellant's behaviour at the proceeding was consistent with his suffering a panic attack and/or pronounced anxiety. The court of appeal set aside the conviction and ordered a retrial.

[30] Another issue to be considered is that the psychiatrist/psychologist's report must be based on identified facts and proved in an admissible way. For example in *R v Gibson*[12] the appellant attempted to lead evidence from a psychiatrist (in 2021) that he was unfit to plead at the time he pleaded guilty in 2015 and 2016. At [10] the court noted that it must be established that the facts on which the opinion is based form a proper foundation for the opinion and the expert's evidence must explain how the area of expertise applied to the facts assumed or observed in order to produce the opinion. In that particular case at [19] that there was no reference to any factual basis for the conclusions reached and therefore the report was not admissible.

[31] Hearsay out of court statements made to the expert are admissible if they are the foundation or form part of the foundation of the opinion, but unless proved they are not evidence of the facts of such statements.[13]

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11 [2011] QCA 289; [2012] 2 Qd R 31.
12 [2022] QCA 151.
13 *Ramsay v Watson* [1962] HCA 65; (1961) 108 CLR 642 at pp 648-649.

[32] Ordinarily in a trial the primary facts relied on would need to be proved by the party seeking to rely on the expert opinion, however it they are hearsay out of court statements not otherwise proved then the judge may direct the jury the opinion may have little or no value.[14]

[33] This principle has less relevance in a sentencing hearing where the court may act on any allegation of fact which is admitted and not challenged.[15] Further section 15 of the *Penalties and Sentences Act 1992(Q)* allows the court to receive any information it considers appropriate to enable it to impose the proper sentence.

Sentencing

[34] Psychiatric and psychological evidence plays an important role in sentencing. This material provides context and at some level often an explanation of the offending.

[35] Reports from Psychiatrists and Psychologists are also useful concerning the rehabilitation of the offender. These reports are often provided to corrective services or parole whichever the case may be for the ongoing management of the offender.

[36] This allows the offender to receive treatment and rehabilitation tailored to their needs. This aims to reduce re offending as a result of poorly managed mental health conditions.

[37] An issue has arisen as to the admissibility of psychological reports at sentence.

[38] At least one judge has expressed reservations on the ability of psychologists as distinct from psychiatrists to diagnose mental health conditions.

[39] However the issue was put to bed in *R v Bassi.*[16] In *Bassi* the applicant pleaded guilty in the Supreme Court to various drug charges. It was accepted by the defence that the possession was for a commercial purpose. Counsel then attempted to tender a psychologist's report which discussed the applicant's addiction to drugs and that he had been diagnosed with ADHD. The Judge refused to accept its tender noting that the author was a psychologist and "he can't diagnose those things."

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14 *R v Schafferius* [1977] Qd R 213
15 Section 132C (2) *Evidence Act* 1977(Q)
16 [2021] QCA 250.

[40] The Court of Appeal noted that trial judge had erred as she had not taken into account the plea of guilty and this was a material error. The court noted that Professor Freeman (the psychologist) held relevant qualifications and was in practice as a Forensic Psychologist. His expertise was not challenged by the crown. At [51] the court noted that for an expert's evidence to be admissible:

- There must be a field of specialised knowledge.
- The witness must demonstrate that by reason of study or experience the witness is an expert in a particular aspect of that field and this is a question of fact.

[41] The court noted at [60] that the evidence of psychologists had been admitted in a number of cases- concerning post-traumatic stress disorder; major depressive disorder; battered woman syndrome and autism spectrum disorder.

[42] At [68] it was said that there was no justification to reject the tender of the report.

[43] *R v SCZ*[17] was another case where the sentencing judge had refused to accept the tender of a psychologist's report. The Court of Appeal admitted the report which set out that the applicant had symptoms consistent with post-traumatic stress disorder and major depressive disorder.

[44] Also the majority in *R v Nguyen*[18] accepted the diagnosis by a psychologist of an untreated depressive disorder and relied on this opinion in determining the matter.

[45] In any event there are a number of sections of the *Penalties and Sentences Act 1992 (Qld)* of relevance.

- Section 9(2)(f) refers to the intellectual capacity of the offender.
- Section 9(3)(a) and (6)(d) refer to the risk of reoffending.
- Section 9(3)(j), (6)(j) and 7(f) refer to medical, psychiatric, prison or other relevant report in relation to the offender.
- Section 9(6)(g) and 7(c) refer to the prospects of rehabilitation.

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17 [2018] QCA 81.
18 [2015] QCA 205.

[46] It has also been held previously that the impaired mental state of an offender may be mitigatory of punishment.

[47] In *R v Verdins*[19] the Victorian Court of Appeal held that impaired mental functioning whether temporary or permanent was relevant to sentencing in that the condition can reduce the moral culpability of the offending conduct. Also whether general or specific deterrence was to be moderated or eliminated as a sentencing consideration depended on the nature and severity of the symptoms and the effect of the condition on the mental capacity of the offender at the time of offending and/or sentencing. It was also held that these principles did not only apply where there is a "serious psychiatric illness."[20] The principles may be applicable where there is any mental disorder or abnormality. This covers a wide variety of conditions.

[48] The Queensland Court of Appeal in *R v Yarwood*[21] adopted these principles. They were also adopted in *R v Goodger*[22] where the Queensland Court of Appeal noted that psychiatric illness not amounting to insanity may reduce the moral culpability of the offender. The condition may have a bearing on the type of sentence imposed and the conditions in which it should be served. Whether general and specific deterrence should be moderated depends upon the nature and severity of the condition and the effect of it on the mental capacity of the offender at the time of sentence, at the time of offending or both. Where there is a serious risk of imprisonment having an adverse effect this will mitigate punishment.

[49] It is crucial that the report obtained addresses these issues and the issues mentioned in the PSA.

[50] One final point I wanted to mention is the issue of intoxication. Section 9(9A) of the PSA provides that voluntary intoxication is not a mitigating factor. This reflects the common law principle stated in *R v Rosenberger; ex parte Attorney General*[23] namely that voluntary intoxication may explain why the offence occurred but does not excuse it.

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19 [2007] VSCA 102; (2007) 16 VR 269.
20 [2007] VSCA 102; (2007) 16 VR 269 at [5].
21 [2011] QCA 367; (2011) 220 A Crim R 497.
22 [2009] QCA 377.
23 [1995] 1 Qd R 677; 76 A Crim R 1.

[51] However in *R v Bowley*[24] the Queensland Court of Appeal held that where an offender was both intoxicated by drugs at the time of the commission of the offence and he or she was suffering from psychosis, then the mental state was not to be excluded from consideration as a mitigating factor.

[52] There is also the recent case of *R v Adam*[25] to consider.

Conclusion

[53] I hope that you are now familiar with the issues involving the use of psychiatric/psychological reports in the Courts.

[54] The use of such reports is a common occurrence in the courts and it is important you be aware of the uses to which they may be put.

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24 (2016) 262 A Crim R 93; [2016] QCA 254.
25 [2022] QCA 41.